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KONSESI KOTAPERMATAMAS SDN BHD v. TEGAS BROADCAST & MULTIMEDIA SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
B [CIVIL APPEAL NO: WA-12BNCC-18-07-2024]
16 JANUARY 2025

Abstract – *(i) A developer, who is the ultimate beneficiary of all goods supplied by various suppliers for its property development, is not obliged to pay the unpaid suppliers down the chain in the event that the developer's main contractor and/or subcontractors with whom the suppliers had contracted failed to make payments for the goods so supplied. Based purely on the doctrine of privity of contract, where there is a breach of contract by the subcontractor when it failed to pay the supplier under the terms of the agreement, the proper recourse for the supplier would be to claim against the subcontractor and not the developer; (ii) The supplier cannot bring itself within s. 71 of the Contracts Act 1950 when it has failed to show it had done the works or delivered the special equipment and its related works for the developer at the material times.*

CONTRACT: *Agreement – Concession agreement – Supply of equipment for project – Concessionaire appointed main contractor who subcontracted part of works to subcontractor – Subcontractor engaged supplier to install and commission special equipment – Failure of subcontractor to make payment to supplier – Whether supplier could claim payment from concessionaire – Privity of contract – Whether arose between concessionaire and supplier – Whether proper recourse for supplier to claim against subcontractor – Whether there was retention of title clause in agreement – Contracts Act 1950, s. 71 – Whether applicable – Whether there would be unjust enrichment – Whether concessionaire estopped from denying liability*

CONTRACT: *Privity of contract – Concession agreement – Supply of equipment for project – Concessionaire appointed main contractor who subcontracted part of works to subcontractor – Subcontractor engaged supplier to install and commission special equipment – Failure of subcontractor to make payment to supplier – Whether supplier could claim payment from concessionaire – Privity of contract – Whether arose between concessionaire and supplier – Whether proper recourse for supplier to claim against subcontractor*

The first respondent was a company specialising in the supply and installation of professional audio-visual equipment and technical services. The appellant was the concessionaire under a concession agreement with the Government of Malaysia and Universiti Teknologi MARA ('UiTM') to design, construct and maintain the new UiTM campus in Rembau ('project').

The appellant appointed Tech Art Sdn Bhd ('Tech Art') as the main contractor for the supply of special equipment for the project. Tech Art subcontracted part of the works to the second respondent who then engaged the first respondent *via* a letter of award and a contract for supply, installation and commissioning special equipment at Faculty of Communication and Media Studies New Campus UiTM Rembau ('agreement'). The first respondent had duly performed its contractual obligations by supplying and installing the equipment and providing the requisite services. Partial payments amounting to RM7,937,297.91 had been made leaving an outstanding sum of RM814, 014.31 remaining unpaid ('outstanding sum') as detailed in the invoices ('invoices') issued to the second respondent. Despite numerous requests for payment made from the first respondent which were acknowledged, the second respondent failed to make the payment of the outstanding sum. At the Sessions Court, the first respondent claimed against the appellant and the second respondent for the outstanding sum. Judgment was granted against the appellant based on the cause of action for unjust enrichment and under s. 71 of the Contracts Act 1950 ('Contracts Act'). The appellant appealed. The issues that arose were : (i) whether the equipment was supplied and delivered to the project site and remained in the appellant's possession; (ii) whether the first respondent had invoiced the second respondent for the work done evidencing the first respondent's intention not to perform the works gratuitously; (iii) whether the appellant had benefited from the delivery, as confirmed by the certificate of practical completion; (iv) whether the invoices contained retention of title clauses, explicitly stating that ownership of the goods would remain with the first respondent until full payment was received; (v) in the case of *KRAAS Solutions Sdn Bhd v. Konsesi Kota Permatamas Sdn Bhd,* it was held that s. 71 of the Contracts Act facilitates recovery against a party who has received benefits from another's lawful act not intended to be gratuitous, even in the absence of a direct contractual relationship; (vi) whether there would be a risk of double payment by the appellant as there was a consent order between the appellant and Tech Art that if the arbitration between the appellant and Tech Art was not concluded by the time of the decision of this court granting judgment in favour of the first respondent, Tech Art shall by consent respect the decision and the sum ordered to be paid shall be reduced from Tech Art's claim against the appellant in the arbitration; and (vii) whether the appellant was estopped from denying liability as it was aware of the outstanding sum owed to the first respondent and had acknowledged the debt in various meetings and correspondences.

Held (allowing appeal with costs):

(1) There was no privity of contract between the appellant and the first respondent in respect of the project. The Government of Malaysia/ UiTM was the developer and had contracted with the concessionaire being the appellant. In turn, the appellant's contract was with the main contractor, Tech Art. It was Tech Art that had appointed the second

respondent for the supply and installation of the special equipment and related works for the project. The first respondent was the supplier appointed by the second respondent for the supply and installation of special equipment and related works under the contract agreement. Based purely on the doctrine of privity of contract, where there was a breach of contract by the second respondent when it failed to pay the first respondent under the terms of the contract agreement, the proper recourse for the first respondent would be to claim against the second respondent under the contract agreement. (paras 18 & 19)

(2) The delivery and installation of the special equipment and the related works was done for the appellant not by the first respondent but by Tech Art. Indeed, the same was done not gratuitously but under the appellant's contract with Tech Art for which the appellant was obliged to make payment thereto. There was pending an arbitration between the appellant and Tech Art relating to and including the claims by Tech Art for the said supply, delivery and installation of the special equipment and related works. If the appellant was obliged to pay the first respondent for the very same special equipment and related works, this would mean that the appellant would be obliged to pay twice in respect of the same goods and services. (paras 25 & 26)

(3) The terms of the consent order did not alter the fact that the appellant never received the supply, delivery and installation of the special equipment and the related works from the first respondent be it on a gratuitous basis or otherwise. The appellant had contracted with Tech Art in respect of the same and was obliged to make payment to Tech Art and not to anyone else. Similarly, when Tech Art delivered and installed the special equipment and its related works to the appellant, it was never intended to be done gratuitously but pursuant to its contract with the appellant. (para 28)

(4) In order for the first respondent to bring itself within s. 71 of the Contracts Act, the first respondent must show that it had done the works or delivered the special equipment and its related works for the appellant at the material times. This had not been shown at all. Notwithstanding the claim by the first respondent, there was no such retention of title clause in the contract between the first respondent and the second respondent in respect of the special equipment delivered. Even if there was in fact a Romalpa clause in the contract between the first respondent and the second respondent, the first respondent would still not be entitled to claim the outstanding sum from the appellant. The first respondent had consented to the possession of the special equipment to be given to the second respondent with full knowledge that the second respondent would deliver or transfer the legal ownership of the same to Tech Art, who in turn would transfer the possession and legal ownership to the appellant. (paras 30-37)

(5) Section 30(2) of the Sales of Goods Act 1967 provides that Tech Art who had received the special equipment from the second respondent in good faith and without notice of any lien or other rights of the first respondent in respect of the goods shall not be subject to any lien or rights of the first respondent at all. There was no evidence that Tech Art had notice of the 'retention of title clause' or that it had received the special equipment from the second respondent otherwise than in good faith. The appellant had no knowledge of the invoices sent by the first respondent to the second respondent. The position *vis-à-vis* the appellant who had received the special equipment from Tech Art and not the second respondent would in fact be even more compelling. (para 38)

(6) This cause of action was premised on the claim that the appellant would be unjustly enriched if this court were to allow the appellant to retain the benefit of the supply, delivery and installation of the special equipment and its related works without any payment. However, because the appellant was currently subject to claims by Tech Art under its contract for works done thereto including the supply, delivery and installation of the special equipment and its related works forming the subject matter of the claim by the first respondent herein against the appellant, it could not be said that the retention of the benefit by the appellant of the special equipment and its related works could be said to be unjust. Indeed, if this court were to allow the first respondent's claims in this action, it may result in the appellant having to pay twice for the same goods. This would be unjust to the appellant. (para 41)

(7) The appellant was only engaging the first respondent on the possibility of a direct contract for future supply of goods and services, in particular, for the delivery of the remaining items of special equipment required for completion of the project. This was to avoid the appellant being in breach of its contract with the developer, UiTM. This could not be treated as an assumption of liability by the appellant to pay the outstanding sum. The appellant had not agreed to pay the first respondent the outstanding sum at all. (para 43)

(8) There is policy consideration why such present claims by the first respondent should not be permitted. Whilst it may appear 'just' that the first respondent should be compensated for the goods ultimately received by the appellant up the chain of the contracts when the second respondent, being insolvent, could no longer pay the same, to allow the first respondent to make a direct claim against the appellant would mean that the first respondent as an unsecured creditor of the second respondent would be treated as a preference creditor of the second respondent. It would have recovered its full debts which it would otherwise have had to share *pari passu* with the other unsecured creditors of the second respondent had the payment of the outstanding sum were

to be paid over to the second respondent from Tech Art after receiving payment of the same from the appellant. The effect of an agreement by the second respondent to permit Tech Art to deduct the outstanding sum from its claims against the appellant and in turn for Tech Art to avoid making such payment to the second respondent would amount to a fraudulent or undue preference under s. 528 of the Companies Act 2016. This was a case where appellate intervention was required. (paras 44 & 46)

Case(s) referred to:

Bauer (Malaysia) Sdn Bhd v Hundred Vision Construction Sdn Bhd & Anor [2020] CLJU 442; [2020] 1 LNS 442 HC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Interdeals Automation (M) Sdn Bhd v. Hong Hong Documents Sdn Bhd [2009] 2 CLJ 321 CA ***(refd)***

KRAAS Solutions Sdn Bhd v. Konsesi Kota Permatamas Sdn Bhd [2018] 9 CLJ 26 CA ***(refd)***

Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd [2010] 5 CLJ 745 FC ***(refd)***

Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] CLJU 161; [1967] 1 LNS 161 PC ***(refd)***

Southern Cable Sdn Bhd v. Skyworld Development Sdn Bhd in Suit WA-22NCC-32-01-2023 (Unreported) ***(refd)***

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***

Usima Sdn Bhd v. Lee Hor Fong [2017] 9 CLJ 646 FC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 528
Contracts Act 1950, s. 71
Sales of Goods Act 1967, ss. 14, 27, 30(1), (2)

For the appellant - Jasvinjit Singh Gurcharan Singh; M/s Au & Jasvinjit
For the 1st respondent - Roeshan Celestine Gomez & Jenny Ng Juen Yee; M/s Muhillan Chan & Gomez

Reported by Suhainah Wahiduddin

JUDGMENT

Ong Chee Kwan J:

Introduction

[1] This judgment deals yet again with the question of whether a developer who is the ultimate beneficiary of all goods supplied by various suppliers for its property development, is obliged to pay the unpaid suppliers down the chain in the event that the developer's main contractor and or subcontractors with whom the suppliers had contracted failed to make payments for the goods so supplied. Can the suppliers rely on s. 71 of the Contract Act 1950 and/or the cause of action for unjust enrichment to recover the outstanding sums due directly from the developer?

[2] In this case, the first respondent had successfully claimed after a full trial against the appellant the sum of RM814,014.31 being the remaining outstanding sums with interest for special equipment and the related works done under a contract between the first respondent and the second respondent (who was unrepresented at the trial) which had remained unpaid.

[3] The appellant contended that it was not obliged to pay the first respondent as there was no privity of contract between them. It was also contended that s. 71 of the Contracts Act 1950 and/or the principles of unjust enrichment simply did not apply to the facts of this case.

Background Facts

[4] The first respondent was a company specialising in the supply and installation of professional audio-visual equipment and technical services.

[5] The appellant was the concessionaire under a concession agreement dated 21 February 2013 with the Government of Malaysia and Universiti Teknologi MARA ("UiTM") to design, construct, and maintain the new UiTM campus in Rembau, Negeri Sembilan ("the project").

[6] The appellant had appointed Tech Art Sdn Bhd ("Tech Art") as the main contractor for the supply of special equipment for the project. Tech Art subcontracted part of the works to the second respondent who then engaged the first respondent *via* a letter of award dated 4 November 2015 and a contract for supply, Installation and Commissioning Special Equipment at Faculty of Communication and Media Studies New Campus UITM Rembau, Negeri Sembilan Darul Khusus ("agreement").

[7] For the purpose of this appeal, this court had proceeded on the assumption that the first respondent had duly performed its contractual obligations by supplying and installing the equipment and providing the requisite services, including Testing & Commissioning ("T&C"), training for UiTM staff, and submission of necessary documentation such as manuals, warranty cards, and as-built drawings under its agreement with the second respondent.

[8] Partial payments amounting to RM7,937,297.91 had been made leaving an outstanding sum of RM814,014.31 remaining unpaid ("the outstanding sum") as detailed in the invoices ("the invoices") issued to the second respondent. Despite made numerous requests for payment from the first respondent which were acknowledged, the second respondent failed to make the payment of the outstanding sum.

[9] At the Sessions Court, the second respondent claimed against the appellant and the second respondent for the outstanding sum. Judgment was granted against the appellant based on the cause of action for unjust enrichment and under s. 71 of the Contracts Act 1950. Unsurprisingly, the appellant appealed against the decision. The second respondent did not appeal.

[10] The learned Session Court Judge had relied on the judgment of the Court of Appeal in *KRAAS Solutions Sdn Bhd v. Konsesi Kota Permatamas Sdn Bhd* [2018] 9 CLJ 26; [2018] 6 MLJ 202 ("*Kraas Solutions*") in coming to her decision. The facts in *Kraas Solutions* are materially identical to the present appeal. The appellant's counsel admitted the same during the hearing. Both cases involved the project and same parties (*ie*, the Government of Malaysia/University Technology Mara (UiTM) being the developer, the concessionaire being the appellant and the main contractor, Tech Art).

[11] The Court of Appeal in *Kraas Solutions* (*supra*) held that all conditions under s. 71 of the CA were fulfilled, allowing the defendant's counterclaim. The relevant findings were:

(i) the defendant supplied and delivered goods to the project site, where the plaintiff (the appellant in this case) was the concessionaire;

(ii) payment was due from Novanexus, but the defendant never intended for the works to be performed gratuitously; and

(iii) the plaintiff benefited from the delivery, as evidenced by the issuance of a certificate of practical completion.

[12] Similarly, it was contended by the first respondent in the present appeal:

(i) equipment was supplied and delivered to the project site and remained in the appellant's possession;

(ii) the first respondent had invoiced the second respondent for the work done evidencing the first respondent 's intention not to perform the works gratuitously;

(iii) the appellant has benefited from the delivery, as confirmed by the certificate of practical completion; and

(iv) no non-completion certificate was issued by the second respondent to the first respondent under cl. 4.2 of their contract, indicating satisfactory completion.

[13] The first respondent further contended that the invoices contained retention of title clauses, explicitly stating that ownership of the goods would remain with first respondent until full payment was received. This clause serves as a protective measure to ensure that the first respondent's interests would be safeguarded in the event of non-payment.

[14] The first respondent contended that in *Kraas Solutions*, the Court of Appeal held that s. 71 of the Contracts Act 1950 facilitates recovery against a party who has received benefits from another's lawful act not intended to be gratuitous, even in the absence of a direct contractual relationship. The court emphasised that the benefiting party is obligated to compensate the party who provided the benefit to prevent unjust enrichment.

[15] Further, the first respondent contended that the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 ("*Dream Property*") affirmed that unjust enrichment is an independent cause of action in Malaysian law, not reliant on the existence of a contractual relationship between the parties. The court highlighted that when one party is enriched at the expense of another, restitution is necessary to prevent injustice.

[16] It was also contended that there would be no risks of double payment by the appellant as there is a consent order dated 6 August 2021 ("the consent order") between the appellant and Tech Art that if the arbitration between the appellant and Tech Art is not concluded by the time of the decision of this court granting judgment in favour of the first respondent, Tech Art shall by consent respect the decision and the sum ordered to be paid shall be reduced from Tech Art's claim against the appellant in the arbitration.

[17] The first respondent further contended that the appellant is estopped from denying liability due to the following:

(i) the appellant was aware of the outstanding sum owed to the first respondent and had acknowledged the debt in various meetings and correspondences. This acknowledgment is a clear representation of its recognition of its obligation;

(ii) the appellant had engaged in discussions and negotiations with the first respondent to settle the outstanding sum directly. By initiating these discussions, the appellant had affirmed its responsibility to ensure the first respondent would be paid; and

(iii) at no point did the appellant raise objections to the invoices issued by the first respondent or to the quality and completeness of the work performed. The absence of any dispute or complaint signified acceptance of the goods and services provided.

Court's Considerations

[18] It is indisputable that there was no privity of contract between the appellant and the first respondent in respect of the project. The Government of Malaysia/University Technology Mara (UiTM) was the developer and had contracted with the concessionaire being the appellant. In turn, the appellant's contract was with the main contractor, Tech Art. It was Tech Art that had appointed the second respondent for the supply and installation of the special equipment and related works for the project. The appellant was the supplier appointed by the second respondent for the supply and installation of special equipment and related works under the contract agreement. For ease of reference, the diagram below shows the relationship between the parties:

A Owner/Developer (GOM/UiTM)

↓

Concessionaire (appellant)?

↓

B Main Contractor (Art Tech Sdn. Bhd.)

↓

Sub-Contractor (Special Equipment) (second respondent)

↓

C Sub-sub-contractor (first respondent)

[19] Based purely on the doctrine of privity of contract, where there was a breach of contract by the second respondent when it failed to pay the first respondent under the terms of the contract agreement, the proper recourse D for the first respondent would be to claim against the second respondent under the contract agreement.

[20] Support for the aforesaid can be seen from the Federal Court case of *Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd* [2010] 5 CLJ 745; [2010] 3 MLJ 721 ("Seloga Jaya"), where it was held that:

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> *[21] But such arrangement has various legal consequences. Since there is no privity of contract between the employer and the subcontractor, going by the general principle of the law of contract, the subcontractor cannot seek redress against the employer in the event of the main contractor failing to pay the subcontractor for the job done after the main contractor had collected payment from the employer*. Or what would F happen if there is a dispute between the main contractor and the employer unrelated to the subcontract resulting in the employer withholding payment to the main contractor who in turn refused to pay the subcontractor. There might also be a situation where the employer only made partial payment to the main contractor giving rise to a dispute as to a fair amount for distribution to the subcontractor. These are only G some of the problems. There may be many others. This list is not exhaustive.
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> (emphasis added)

[21] Thus, following the Federal Court case of *Seloga Jaya*, since there existed a contract between the first respondent and the second respondent, H the only recourse that the first respondent had was to sue the second respondent for the outstanding sum. However, in the present case, the first respondent had in addition to claiming against the second respondent under the agreement sought to recover the outstanding sum from the appellant under s. 71 of the Contracts Act 1950 and or in a cause of action based on unjust enrichment in reliance on the *Kraas Solutions*. I

[22] I had previously dealt with a similar situation in *Southern Cable Sdn Bhd v. Skyworld Development Sdn Bhd* in Suit WA-22NCC-32-01-2023 where I had held that s. 71 of the Contracts Act 1950 had no application at all to the facts similar to this case.

[23] Section 71 of the Contracts Act 1950 provides as follows:

> Obligation of person enjoying benefit of non-gratuitous act
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> s 71. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[24] The elements to be satisfied in order for s. 71 of the Contracts Act 1950 to be applicable have been laid down in the Privy Council case of *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] CLJU 161; [1967] 1 LNS 161 ("*Susur Rotan*") which held as follows:

> It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under s. 71.
>
> The doing of the act or the delivery of the thing referred to in the section:
>
> (1) must be lawful
>
> (2) must be done for another person
>
> (3) must not be intended to be done gratuitously
>
> (4) must be such that the other person enjoys the benefit of the act or the delivery.

[25] In the present case, the delivery and installation of the special equipment and the related works was done for the appellant not by the first respondent but by Tech Art. Indeed, the same was done not gratuitously but under the appellant's contract with Tech Art for which the appellant was obliged to make payment thereto. In fact, the first respondent acknowledged that there is pending an arbitration between the appellant and Tech Art relating to and including the claims by Tech Act for the said supply, delivery and installation of the special equipment and related works.

[26] If, as contended by the first respondent, that the appellant is obliged to pay the first respondent for the very same special equipment and related works, this would mean that the appellant would be obliged to pay twice in respect of the same goods and services.

[27] The first respondent had sought to undermine the aforesaid by referring to the consent order, contending that there would be no risks of double payment by the appellant because Tech Art had agreed to deduct the outstanding sum claimed by the first respondent from its claims against the appellant in the arbitration, in the event this court were to allow the first respondent's claim against the appellant in this action.

[28] With respect, the terms of the consent order do not alter the fact that the appellant never received the supply, delivery and installation of the special equipment and the related works from the first respondent be it on a gratuitous basis or otherwise. The appellant had contracted with Tech Art in respect of the same and was obliged to make payment to Tech Art and not to anyone else. Similarly, when Tech Art delivered and installed the special equipment and its related works to the appellant, it was never intended to be done gratuitously but pursuant to its contract with the appellant.

[29] Indeed, the terms of the consent order expressly provide that Tech Art's agreement to reduce or exclude the outstanding sum claimed by the first respondent from Tech Art's claims against the appellant in the arbitration is subject to the agreement of the second respondent. In this regard, there was no evidence that the second respondent had agreed to the same. What this means is that without the second respondent's agreement, the appellant will still be obliged to pay Tech Art the outstanding sum even after the appellant pays the first respondent if the claims herein were to be allowed. Tech Art will need the appellant to pay the same because it is obliged to pay the second respondent under its contract with the second respondent in respect of the special equipment and the related works.

[30] In *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002 ("*Tanjung Teras*"), the Court of Appeal had referred to the above cited case of *Susur Rotan* where the Privy Council set out the four conditions to be satisfied to establish a claim under s. 71 of the CA 1950. In particular, in respect of the second condition, *ie*, 'that the doing of the act or the delivery of the thing must be done for another person', the Privy Council had held thus:

> It is the second point which in their lordship's judgment is decisive of this case. As a matter of phraseology the section seems clear upon it. *To bring the section into play the person when doing the act or delivering the thing must do the act "for another person" or deliver the something "to him". So, that his then present intention must be to do the act or to deliver the thing for or to another".*
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> (emphasis added)

[31] Although the Court of Appeal in *Tanjung Teras* did not agree with the learned High Court Judge's finding on the fact that the works were not done by the plaintiff for the defendant, the Court of Appeal had followed the observation by the Privy Council in regard to the second condition of s. 71. In other words, in order for the first respondent in this case to bring itself within s. 71, the first respondent must show that it had done the works or delivered the special equipment and its related works for the appellant at the material times. On the facts of the present case, this had not been shown at all.

[32] The first respondent contended that in *Kraas Solutions*, the facts were similar to the present case where the electrical goods were delivered to the project site and the Court of Appeal had no issue with condition (2) of s. 71 of the Contracts Act 1950. In particular, the following passages of the judgment were referred:

> [62] The appellant submits that based on the factual matrix of the matter before this court, the goods were supplied and delivered by the appellant to the project site wherein the respondent was the concessionaire to the project. The fact that the appellant was to receive payment from Novanexus or the joint contractors does not alter the fact that the appellant never intended the works *ie*, the supply and delivery of the furniture, to be done gratuitously. The respondent is enjoying the benefit of the said delivery, and the certificate of practical completion has since been issued. Therefore, since the conditions to s. 71 of the CA have been fulfilled, compensation must be paid to the appellant as the respondent has enjoyed the benefit of the appellant's act.
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> [63] *The learned judge ruled, however, that there is no evidence that when the goods were delivered by the appellant to the project site, that they were doing so for the benefit of the respondent as "the other". If anything, "the other" in the present context is Novanexus, with whom the appellant had a contractual relationship. As such, the learned judge concluded that one of the important criteria for a claim under s. 71 of the CA is absent*.
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> *[64] With respect, we are of the view that s. 71 of the CA can be properly invoked by the appellant, and we agree with the above submissions of the appellant. It is true, as stated by the learned judge, that the appellant has a contractual relationship with Novanexus and the appellant should be paid by Novanexus for any delivery of goods to Novanexus. In this case, according to the CSA, the appellant was to deliver the goods to the respondent at the project site, but payment must be made to the appellant by Novanexus. Since no such payment has been made by Novanexus, it follows that the appellant is entitled to compensation, or be restored the goods delivered [(see Dream Property (supra), and Tanjung Teras (supra)]. Therefore, if the respondent wishes to retain the goods or the benefit, the respondent has to pay the appellant for the amount claimed by the appellant. With respect, we cannot agree with the learned judge's reasoning as it would render s. 71 meaningless. Section 71 is precisely to facilitate recovery against a party with whom there is no contractual relationship but who has nevertheless received the benefit of the appellant's lawful act which was never intended to be done gratuitously*. This was clearly explained in Dream Property and Tanjung Teras.

[33] With respect, the Court of Appeal in *Kraas Solutions* had completely ignored the *ratio decidendi* of the Privy Council in *Susur Rotan* and the judgment by the Court of Appeal in *Tanjung Teras* on the interpretation of s. 71 of the Contracts Act 1950, in particular to condition (2) of the section. The decision of *Susur Rotan* was binding on the Court of Appeal and on this court. Recently, the Federal Court in *Usima Sdn Bhd v. Lee Hor Fong* [2017] 9 CLJ 646 had affirmed the decision of the Privy Council in *Susur Rotan*.

[34] In any case, the Court of Appeal in *Kraas Solutions* had found that the goods that were delivered to the respondent in that case were subject to an express retention of title clause in the contract between the appellant and the contractor, Novanexus. Under cl. 9 of its contract with Novanexus, the appellant retained the title to the goods delivered if no payments were made by Novanexus (which was the case). The Court of Appeal held that the respondent, if it wished to retain the goods or the benefits *ie*, to claim full possession and ownership over the goods, notwithstanding the Romalpa clause, would have to pay the appellant for the same.

[35] In our instant case, notwithstanding the claim by the first respondent, there was no such retention of title clause in the contract between the first respondent and the second respondent in respect of the special equipment delivered. This is because the clause that the first respondent had relied upon, namely:

> It is hereby covenanted that the seller reserves the right at all times to repossess the goods/items sold and delivered to the buyer under this invoice/delivery order on account of the buyer's failure to settle the payments in full for such goods/items.

was never incorporated into the terms of the contract between the first respondent and the second respondent at all. The said 'term' was only inserted unilaterally by the first respondent in its invoices issued to the second respondent post the conclusion of the contract. Even then, the said clause did not state that the legal title of the goods/items sold would continue to be with the first respondent but merely that the first respondent has a right to repossess the same upon non-payment. In fact, the existence of the Romalpa clause was not even pleaded.

[36] In *Interdeals Automation (M) Sdn Bhd v. Hong Hong Documents Sdn Bhd* [2009] 2 CLJ 321, the Court of Appeal confirmed the trite principle that once a contract had been concluded, a stipulation that is imposed unilaterally subsequently would not form an integral part of the contract.

[37] In truth, even if there was in fact a Romalpa clause in the contract between the first respondent and the second respondent, it is my judgment that the first respondent would still not be entitled to claim the outstanding sum from the appellant. This is because the first respondent had consented to the possession of the special equipment to be given to the second respondent with full knowledge that the second respondent would deliver or transfer the legal ownership of the same to Tech Art, who in turn would transfer the possession and legal ownership to the appellant. In such a case, s. 30(2) of the Sales of Goods Act, 1967 ("the SOGA 1967") stipulates thus:

> (2) *Where a person*, having bought or agreed to buy *goods, obtains, with the consent of the seller, possession of the goods* or the documents of title to the goods, *the delivery or transfer by that person* or by a mercantile agent acting for him *of the goods* or documents of title *under any sale*, pledge, or other

disposition thereof *to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist*. A

(emphasis added)

[38] Put it simply, s. 30(2) of the SOGA 1967 provides that the Tech Art who had received the special equipment from the second respondent in good B faith and without notice of any lien or other rights of the first respondent in respect of the goods shall not be subject to any lien or rights of the first respondent at all. In this regard, there is no evidence that Tech Art had notice of the 'retention of title clause' and or that it had received the special equipment from the second respondent otherwise than in good faith. The C appellant had no knowledge of the invoices sent by the first respondent to the second respondent. The position *vis-à-vis* the appellant who had received the special equipment from Tech Art and not the second respondent would in fact be even more compelling.

[39] The Court of Appeal in *Kraas Solutions* had referred to ss. 14, 27 and D 30(1) of the SOGA 1967 but did not consider s. 30(2) thereto at all. Had this section been brought to the attention of the Court of Appeal, a different result may well have been made.

[40] As regards the first respondent's claims for unjust enrichment under common law, in the case of *Dream Property*, our Federal Court held thus: E

> The principle underlying the cases of *Banque Financiere de la Cite v Parc (Battersea) Ltd* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. IRC* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that: F
>
> (a) the plaintiff must have been enriched;
>
> (b) the enrichment must be gained at the defendant's expense;?
>
> (c) that the retention of the benefit by the plaintiff was unjust; and
>
> (d) there must be no defence available to extinguish or reduce the G plaintiff's liability to make restitution.

[41] This cause of action is premised on the claim that the appellant would be unjustly enriched if this court were to allow the appellant to retain the benefit of the supply, delivery and installation of the special equipment and its related works without any payment. However, in this case, because the H appellant is currently subject to claims by Tech Art under its contract for works done thereto including the supply, delivery and installation of the special equipment and its related works forming the subject matter of the claim by the first respondent herein against the appellant, it cannot be said that the retention of the benefit by the appellant of the special equipment and I its related works can be said to be unjust. Indeed, if this court were to allow the first respondent's claims in this action, it may result in the appellant having to pay twice for the same goods. This will be unjust to the appellant.

[42] Finally, the first respondent contended that the appellant had acknowledged its obligations to pay the outstanding sum during various meetings with the first respondent. It was contended that the appellant had engaged in discussions and negotiations with the first respondent to settle the outstanding sum directly. By initiating these discussions, the appellant had affirmed its responsibility to ensure the first respondent would be paid. The appellant also never raised any objections to the invoices raised by the first respondent.

[43] Again, the first respondent's aforesaid contentions are without merits. Upon examination of the documents closely, one will readily see that the appellant had not agreed to pay the first respondent the outstanding sum at all. Instead, the appellant was only engaging the first respondent on the possibility of a direct contract for future supply of goods and services, in particular, for the delivery of remaining items of special equipment required for completion of the project. This was to avoid the appellant being in breach of its contract with the developer, UiTM. This cannot be treated as an assumption of liability by the appellant to pay the outstanding sum at all.

[44] There is a policy consideration why such present claims by the first respondent should not be permitted. Whilst it may appear 'just' that the first respondent should be compensated for the goods ultimately received by the appellant up the chain of the contracts when the second respondent, being insolvent, could no longer pay the same, to allow the first respondent to make a direct claim against the appellant would mean that the first respondent as an unsecured creditor of the second respondent would be treated as a preference creditor of the second respondent. It would have recovered its full debts which it would otherwise have had to share *pari passu* with the other unsecured creditors of the second respondent had the payment of the outstanding sum were to be paid over to the second respondent from Tech Art after receiving payment of the same from the appellant. The effect of an agreement by the second respondent to permit Tech Art to deduct the outstanding sum from its claims against the appellant and in turn for Tech Art to avoid making such payment to the second respondent would amount to a fraudulent or undue preference under s. 528 of the Companies Act 2016.

[45] The aforesaid is the reason why Justice Lee Swee Seng in *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd & Anor* [2020] CLJU 442; [2020] 1 LNS 442; [2020] MLJU 543 held that restitution will be denied if the imposition of a liability in restitution would result in the overturn of an existing allocation of risks or limitation of liability previously established by contract. The learned High Court Judge, Lee Swee Seng J (as he then was) held as follows:

> [90] I do not see how a section 71 claim can be brought when contractually all aspects of the substructure works including variation works had been contractually parcelled out from D2 to D1 and then from D1 to the plaintiff.

...

[102] *The court is not inclined to invoke section 71 of the Contracts Act 1950 in the name of doing substantial justice, having satisfied itself that D2 as the employer had in all probabilities paid D1, its main contractor. This is not a case where the employer D1 had been shown to have unjustly enriched itself. If at all there is anyone that had been unjustly enriched it is D1.*

[108] The court must guard against granting a claim in quantum meruit under our section 71 of the Contracts Act 1950 under the guise of doing substantial justice when parties have carefully thought of and provided for the allocation of risks under the respective main contracts and subcontracts where the rights and remedies of the parties affected can be pursued fullest to its final end. Otherwise the court runs the risk of being accused of rewriting the bargain of the parties.

(emphasis added)

Conclusion

[46] In the premises, it was my judgment that this was a case where appellate intervention was required and for the reasons cited above, the appeal was allowed with costs.